THE HON'BLE SMT. JUSTICE T. MEENA KUMARI
AND
THE HON'BLE SRI JUSTICE G. CHANDRAIAH

WRIT PETITION No. 5254 of 2007

O R D E R: (Per the Hon'ble Smt. Justice T. Meena Kumari)

This writ petition is filed seeking to issue a writ Habeas Corpus directing the respondents to produce the detenu K.M. Mallikarjuna @ Malli before this Court and to release him forthwith by setting aside the order of detention passed by the 2nd respondent in R.C.No.C1/116/M/2007 dated 26.2.2007 as illegal and arbitrary.

Heard the learned counsel for the petitioner and the learned Assistant Government Pleader appearing on behalf of the learned Advocate General.

The case of the petitioner is that though the detenu is not indulging in any bootlegging activities, the 2nd respondent herein passed the order of detention dated 26.2.2007 alleging various offences against the detenu, which is illegal and arbitrary. The activities of the detenu in no way caused prejudice to the maintenance of public order. The order of detention is unsustainable in law for the reason that it does not disclose the period of detention. The petitioner filed additional affidavit vide WPMP No. 10234 of 2007 stating that in the order of detention the detaining authority has not stated the details of the detenu having been released on bail and considered the said aspect even though the detenu was released on bail in Cr.No. 86 of 2005, Cr.No. 359 of 2006, Cr.No. 34 of 2006 and Cr.No.442 of 2006-2007. It is further contended by the learned counsel for the petitioner that the detenu was also not supplied with the bail applications and the bail orders and therefore the order of detention is vitiated by so many

irregularities and is liable to be set aside.

The 2nd respondent filed counter affidavit denying the allegation that the detenu is not indulging in any bootlegging activities. It is further stated that the material placed before him disclosed that the detenu involved in Cr.No. 442/2006-07 dated 5.12.2006 for transporting 6900 arrack sachets from Karnataka State and Cr.No. 34/2006 dated 24.4.2006 for possessing a bag containing 200 Karnataka arrack sachets and half kilogram ganja. It is further stated that the detenu is accused No.3 in Cr.No. 359/2006 dated 1.12.2006 wherein the detenu along with 4 other persons was found in possession of 5400 Karnataka arrack sachets and further 2300 Karnataka Arrack sachets in 9 bags were seized from the possession of the detenu for which Cr.No. 86/2005 dated 10.12.2005 was registered. Samples of the said seized material were sent for chemical analysis and the Chemical Examiner opined that they contain “diluted arrack, unfit for human consumption and injurious to health”. Pursuant to the order of detention, the detenu was taken into custody on 2.3.2007 and lodged at Central Prison, Cherlapally, Ranga Reddy District and at the time of taking him into custody, the order of detention, grounds of detention and the material relied upon were served on the detenu and the same was acknowledged by him. Thus, it is stated that all the requirements in law have been complied with and the order of detention is passed on justified grounds and therefore the writ petition may be dismissed.

Having heard the rival contentions of the learned counsel for the petitioner as well as the learned Assistant Government Pleader appearing on behalf of the learned Advocate General, this Court once again perused the material available on record. While

coming to the conclusion that the detenu involved in bootlegging activities, one of the grounds for the 2nd respondent was the confession statement of accused No.1 in Cr.No. 359/2006 in which the detenu was shown as accused No.3. It is the contention of the learned counsel for the petitioner that such confession of co-accused is inadmissible to pass detention order against the detenu. It is true that confession of co-accused cannot be the sole basis to take a definite stand against the detenu but it may be taken into consideration in addition to the other attending circumstances. To consider the confession of a co-accused, it should be seen whether the confession was perfectly voluntary and if so, whether it is true and trustworthy. The apex Court time and again observed that the confession of co-accused is a very weak type of evidence and it is less weak than that of the evidence of an accomplice because an accomplice would be subjected to give evidence on oath and cross-examination whereas it is not so in the case of confession of co-accused. Therefore, the ground taken by the 2nd respondent while passing the detention order that the co-accused in Cr.No.359/2006 confessed against the detenu cannot be sustained.

The contention of the learned Assistant Government Pleader appearing for respondent No.2 is that the non-supply of bail application or bail order may not vitiate the detention order. For that, she cited a decision of the Supreme Court in **Sunila Jain v. Union of India and another**.[1] wherein it is held by the Supreme Court that non-supply of bail application may not be a ground for setting aside the detention order. But, in this case, it is the specific case of the learned counsel for the petitioner that the detenu was not supplied with either bail application or bail order. Non-supply of bail application, as rightly

held by the Supreme Court, may not be a ground for setting aside the detention order but non-supply of bail order is certainly a relevant aspect in considering whether the detention order is bad in law or not. For this purpose, it is pertinent to note the decisions of the apex Court as well as this Court relating to this aspect, which are as under:

The Supreme Court in **Icchu Devi v. Union of India**[2] 1983 held "when clause (5) of Article 22 and Sub-Section (3) of Section 3 of the COFEPOSA Act provide that the grounds of detention should be communicated to the detenu within five of fifteen days, as the case may be, what is meant is that the grounds of detention in their entirety must be furnished to the detenu. If there are any documents, statements or other materials relied upon in the grounds of detention, they must also be communicated to the detenu, because being incorporated in the grounds of detention, they form part of the grounds and the grounds furnished to the detenu cannot be said to be complete without them. It would not therefore be sufficient to communicate to the detenu a bare recital of the grounds of detention, but copies of the documents, statements and other materials relied upon in the grounds of detention must also be furnished to the detenu within the prescribed time subject of course to clause (6) of Article 22 in order to constitute compliance with clause (5) of Article 22 and Section 3, sub-section (5) of Article 22 and Section 3, sub-section (3) of the COFEPOSA Act. If this requirement of clause (5) of Article 22 read with Section 3, sub-section (3) is not satisfied, the continued detention of the detenu would be illegal and void".

In **M. Ahamedkutty v. Union of India and another**[3] the Supreme Court held that the detenu has right to have copies of vital documents irrespective of whether he knows about their contents

or not. It is further held:

> "Considering the facts the bail application and the bail order were vital materials for consideration. If those were not considered the satisfaction of the detaining authority itself would have been impaired, and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. It must therefore, be held that it amounted to denial of the detnu's right to make an effective representation and that it resulted in violation of Article 22(5) rendering the continued detention of the detention illegal and entitling the detenu to be set at liberty in this case".

The above decision makes it amply clear that the bail application and the bail order are vital material for consideration. There is no mention even in the counter affidavit as to whether the detaining authority considered the fact that the detenu was released on bail and whether the bail applications and the bail orders were supplied to the detenu for coming to the subjective satisfaction to pass the detention order. As held by the Supreme Court in **M. Ahamedkutty's** case (referred (3) supra), if the bail application and the bail order were not considered, the satisfaction of the detaining authority itself would have been impaired and if those had been considered, they would be documents relied on by the detaining authority though not specifically mentioned in the annexure to the order of detention and those ought to

have formed part of the documents supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete.

In an unreported order in W.P. No. 11247 of 2006 dated 30-8-2006, a Division Bench of this Court held “Importantly, the failure in recording the enlargement of the detenu on bail is undoubtedly a ground to quash the order of detention”.

In another unreported order in W.P. No. 25192 of 2006 dated 9.2.2006, another Division Bench of this Court dealing with similar fact- situation held “It appears to us that the officer was not even aware of the fact that in all the three cases, the competent Court had granted bail to the petitioner’s husband and he was a free man on the date of detention. This omission is too serious to be ignored by the Court because, as mentioned above, the order of detention has grave adverse consequence on the liberty of an individual”.

From the above decisions it is amply clear that non-supply of bail order cannot be viewed lightly and it amounts to a serious lapse on the part of the authority who passed the detention order. While passing the detention order, the concerned authority is under an obligation to consider all the relevant material and failure to consider such material would impair the satisfaction of the detaining authority in passing the detention order. All such material must be supplied to the detenu with the grounds of detention and without them the grounds themselves could not be said to have been complete. There is no mention in the detention order as to whether the competent

Court had granted bail to the detenu.

For the foregoing reasons, the order of detention passed by the 2nd respondent dated 26.2.2007 is liable to be set aside. However, the efforts made by the learned Assistant Government Pleader for persuading us are appreciated.

In the result, the order in Ref. No. C1/116/M/2007 dated 26.2.2007 passed by the 2nd respondent herein is quashed and the writ petition is allowed. The detenu by name K.M. Mallikarjuna @ Malli s/o Kareppa, aged 36 years, resident of Pedda Harivanam village, Adoni Mandal, Kurnool District is directed to be released forthwith, if not required in any other case.

T. MEENA KUMARI, J.

G. CHANDRAIAH, J.

Date: 24-04-2007.

MVB.

---

[1]. (2006) 3 Supreme Court Cases 321

[2] AIR 1980 SC

[3] (1990) 2 Supreme Court Cases 1